Supreme Court, U.S.
FILED
DEC 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2039

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,
Petitioner,

vs.

FRIEDA JOYCE JOHNSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF HORTON JOHNSON, DECEASED,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

STATUTES

The Government has set forth only one of the relevant statutes in its brief, the statute creating jurisdiction in United States District Courts over claims arising under the Federal Tort Claims Act (FTCA). The plaintiff's substantive cause of action for wrongful death against the Government is created elsewhere in 28 U.S.C., Ch. 171, §§2671-80.

28 U.S.C. §2674 provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 U.S.C. §2680 provides in relevant part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> . . . .
>
> (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

STATEMENT

The Government's statement of the facts is neither complete nor entirely accurate. A brief supplementation is therefore necessary. The plaintiff's complaint was dismissed upon motion by the district court, so the only "facts" in the record are the allegations of the plaintiff's complaint—which read in pertinent part as follows:

> 5. On January 7, 1982, plaintiff's decedent was a member of the U.S. Coast Guard, stationed in Hawaii, and a helicopter pilot.
>
> 6. In the early morning hours of January 7, 1982, plaintiff's decedent, while acting incident and pursuant to the Coast Guard's quasi-civilian mission to provide search and rescue efforts for civilians in distress,

undertook a rescue mission aboard a Coast Guard Helicopter which was designed to assist a civilian boat that had issued a distress call. The mission therefore had no relationship whatsoever to any military objective of the United States government.

7. During the rescue mission, while over open ocean, plaintiff's decedent requested the civilian Federal Aviation Administration controller to assume positive radar control over the helicopter because of poor weather and visibility, which made visual control of the helicopter by plaintiff's decedent impossible.

8. Because of the poor visibility, the civilian FAA controller at Honolulu ARTCC did assume radar control over plaintiff's decedent's aircraft, which control was designed to allow the FAA controller to plot a course for plaintiff's decedent and guide the helicopter through the inclement weather.

9. The FAA controllers responsible for guiding plaintiff's decedent's helicopter were civilians, were not members of the Coast Guard or any other branch of the military service, and at all times acted within the course and scope of their employment by the defendant United States as civilian air traffic controllers.

10. Plaintiff's decedent's helicopter was flying under Instrument Flight Rules (rather than visual flight rules, where plaintiff's decedent would have been responsible for the path of the helicopter) and under the radar control of the FAA at the Honolulu ARTCC.

11. The civilian FAA controllers were negligent in their control and guidance over decedent's helicopter and negligently guided the helicopter directly into

the side of a mountain on the island of Molokai. In fact, J. Lynn Helms, FAA Administrator, has admitted in a public interview that the FAA erred in guiding the helicopter. A copy of the interview, at p. 51 of the August 9, 1982, issue of *U.S. News & World Report* is attached.

12. As a proximate result of the negligence of the civilian FAA controllers, plaintiff's decedent was killed.

(R. 1-3).[1]

There is no responsive pleading in the record, so these allegations—including the Government's public admission of controller error—stand admitted on the record. It is upon these admitted facts, of course, that the court of appeals' decision squarely turns:

> . . . The complaint in this case alleges that plaintiff's decedent was killed because civilian FAA air traffic controllers negligently guided the helicopter he was piloting into a mountain. There is absolutely no hint in the scant record before this court that the conduct of any alleged tortfeasor even remotely connected to the military will be scrutinized if this case proceeds to trial. Nor is there a suggestion that examining the conduct of a civilian would in any way implicate the military services. Since the prosecution of plaintiff's claim cannot conceivably involve or compromise a military relationship or, for that matter, the military disciplinary structure, the prosecution of plaintiff's claim will not encroach upon the rationale

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1. The more specific facts which we intend to prove in support of these general allegations are set forth briefly in footnote 9, *infra*.

> which "serves largely if not exclusively as the predicate for the *Feres* doctrine." . . . We therefore are unable to discern any sound reason for barring plaintiff's suit under the *Feres* doctrine.

Johnson v. United States, 749 F.2d 1530, 1539 (11th Cir. 1985), *approved on reh'g en banc*, 779 F.2d 1492 (11th Cir. 1986) (footnotes omitted).

SUMMARY OF ARGUMENT

The Government asserts that, prior to this case, the lower courts had consistently applied the *Feres* doctrine to bar claims by service members, whether by acts of civilian or military employees of the Government. This assertion is incorrect. *Some* of the lower courts had consistently applied *Feres* in that manner, because they reached the conclusion that the "status" of the claimant was the touchstone of the *Feres* doctrine. Over the years, however, this Court refined the foundations of the *Feres* doctrine, announcing that the doctrine "seems best explained" by only one of its initially articulated rationales —what has now become known as the "military discipline rationale".

With that lead, the lower courts began looking beyond the purely "status-related" test of the earlier decisions to the *reasons* underlying the *Feres* doctrine, and began declining to erect the *Feres* bar when its primary rationale was not implicated by the facts of the particular case. As a result of this shift in methodology, there are numerous recent decisions of the lower courts, including the decision under review, which hold that the *Feres* bar should be interposed only when pursuit of the litigation would involve the judiciary in sensitive military affairs at the

expense of military discipline. Clearly, there is no consistency at all among the lower courts where application of the *Feres* doctrine is concerned.

It would also appear that this Court's latest foray into the field recognized the ongoing debate among the lower courts, and at least tentatively resolved that debate in a manner consistent with the lower court's resolution of the instant case. In *United States v. Shearer*, 473 U.S. ....., 105 S. Ct. 3039, 87 L. Ed.2d 38 (1985), this Court reiterated that *Feres* "seems best explained" by the military discipline rationale, and it observed that the other rationales advanced in the past as support for the *Feres* doctrine were "no longer controlling". The Court also appears to have rejected the position advanced by the Government here—that application of the *Feres* bar depends exclusively upon the active-duty status of the serviceman, rather than the extent to which the facts implicate the reason for the doctrine—and it appears to have announced that the *Feres* bar should be erected only where the facts upon which the suit is bottomed would involve the judiciary in sensitive military affairs at the expense of military discipline. We therefore think that *Shearer* implicitly approves the reasoning utilized by the Court below—and, if the lower court was correct that maintenance of this action will not impair military discipline, the correctness of the result reached upon that reasoning follows in due course.

Although the Government has only grudgingly conceded the relevance of *Shearer* here, it has apparently read the handwriting on the wall—and the bulk of its brief is therefore devoted to an attempt to disprove the lower court's conclusion that this action will not impair military discipline. All of the so-called "sensitive mil-

itary matters" which the Government has injected into this case to that end are purely hypothetical, however. They should never arise in this litigation, because the Government has already publicly admitted its liability, and the only issues which are likely to be tried in this case are the damage issues. In any event, the very most that the record in this case presently reflects is straightforward negligence by an air traffic controller under routine flight conditions, and that the litigation of this case will be no different in any respect than it would have been if LCDR Johnson had been a civilian. Suits by the survivors of civilian pilots against the FAA have never been barred by the *Feres* doctrine, and there is no reason why the instant suit should be barred merely because LCDR Johnson happened to be wearing a uniform when he requested routine civilian air traffic control service.

If the Court is at all concerned about any of the hypothetical assertions with which the Government has attempted to salvage *Feres* on the straightforward facts in this case, the very worst that it should do is allow the case to proceed so that the facts can be sufficiently developed to determine if the Government's concerns have any foundation. That alternative disposition is important to us, because we know what the facts will be in this case, and we know that they will not implicate any of the Government's hypothetical concerns. The Government is also well aware of that fact—and it should not be allowed to escape this litigation for reasons it cannot prove, simply because it has never been called upon to prove them.

The Government's miscellaneous contention, that this Court should read an "exclusive remedy" provision into

the Veterans' Benefits Act, has been rejected by this Court on several prior occasions, and it should be rejected again for the same reasons—especially since the Veterans' Benefits Act expressly recognizes the potential of duplicate benefits under the FTCA, and provides a method for offsetting cumulative recoveries. The Government's other miscellaneous concern, that it would be anomalous for its liability to be determined by the different laws of the several states, might be a relevant concern if our suit involved the negligence of a fellow serviceman; it is not a relevant concern here, however, because our suit involves the negligence of an air traffic controller employed by the FAA. The FTCA provides that the propriety of the conduct of air traffic controllers is to be judged by the laws of the several states; the laws of the several states are routinely applied to that issue in suits involving civilian plaintiffs; and no reason suggests itself why it would be anomalous for the same laws to govern disposition of the instant case.

In short and in sum, because maintenance of the plaintiff's FTCA action will not involve the judiciary in sensitive military affairs at the expense of military discipline, *Feres* is a rule without a reason on the facts in this case. Simply because LCDR Johnson was wearing a uniform at the time of his death is no justification for depriving his survivors of the remedy provided by Congress to the citizens of this nation who suffer damage because of the negligence of the Government. The issue presented here was correctly decided by the lower court, and its decision should be affirmed.

ARGUMENT

THE FERES DOCTRINE DOES NOT BAR THE PLAINTIFF'S CONGRESSIONALLY-AUTHORIZED WRONGFUL DEATH ACTION, BECAUSE PROSECUTION OF THE ACTION WILL NOT IMPLICATE THE ONLY SUBSTANTIAL REASON FOR THE DOCTRINE—THE NEED TO PREVENT JUDICIAL INVOLVEMENT IN SENSITIVE MILITARY AFFAIRS AT THE EXPENSE OF MILITARY DISCIPLINE.

The FTCA waives the historical immunity of the sovereign, and authorizes tort actions against the Government for the negligence of its employees. If LCDR Johnson had been a civilian member of, for example, the Civil Air Patrol, his wrongful death would clearly have been actionable under the FTCA. Unfortunately (perhaps) for his survivors, however, he was a member of the Coast Guard at the time the Government directed him to fly his aircraft into the side of a mountain. In its broadest sense, therefore, the issue presented here is whether Mr. Johnson's different "status" as a "serviceman" should make a difference. By its express terms, the FTCA rather emphatically says "no"—since its exceptions (insofar as they are relevant here) retain immunity only for "claim[s] arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war*". 28 U.S.C. §2680(j) (emphasis supplied). In a narrower sense, therefore, the issue presented here is whether this Court should create an exception to the FTCA which Congress did not.

In *Feres v. United States*, 340 U.S. 135, 138 (1950), this Court did create a limited exception to the FTCA for suits brought against the Government by servicemen

alleging the "negligence of others in the armed forces". Despite decades of pointed criticism, this decision has survived the scrutiny of time, and we do not intend to quarrel with it here. Our quarrel is with the Government's attempt to expand the narrow exception created by *Feres* to cover the quite different circumstance presented by this case. The precise issue presented here is therefore this: should the limited exception to the FTCA represented by *Feres* be expanded to bar suits against the Government brought by servicemen to redress injuries caused by the negligence of civilian employees of a civilian agency of the Government. Until this case, that precise issue has never been squarely presented to this Court.[2]

Although the issue is obviously an important one, our argument will be brief—for several reasons. First, this Court has decided enough "*Feres* doctrine" cases in the recent past that it needs no lengthy exegesis upon its long and tortured history. Second, the Court is also undoubtedly aware that the doctrine has been so widely criticized over the years that it is now commonly referred to as the "much-maligned *Feres* doctrine", and that there is presently a strong contingent in Congress with plans to modify it (at least in the area of medical malpractice), so no lengthy analysis of the critical commentary would seem to be necessary. Third, the panel which initially decided

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2. The Government has culled a few isolated phrases from some of this Court's past decisions, and has asserted that this Court has always prohibited FTCA actions by servicemen for the negligence of Government "officials" and "agents"—whether military or civilian. That, of course, is simply not true. *See Brooks v. United States*, 337 U.S. 49 (1949); *United States v. Brown*, 348 U.S. 110 (1954). In addition, however phrased, all of this Court's past decisions involved essentially intramilitary disputes. This is clearly the first case in which this Court has ever considered whether *Feres* bars a serviceman's action for injury caused by the negligence of a civilian employee of a civilian agency of the Government.

this case below filed a thorough and thoughtful opinion which states our position here much more eloquently than we could ever have hoped to do, and we are content to let that opinion speak largely for itself. Finally, if the 8-4 decision of the en banc court (which approved the panel's opinion) correctly interpreted the strong signals sent by this Court's recent decision in *United States v. Shearer*, 473 U.S. ....., 105 S. Ct. 3039, 87 L. Ed.2d 38 (1985), the issue presented here has effectively been decided by this Court. For all of these reasons, we will rely in large measure upon the court of appeals' decision for our primary argument here, and limit our response to the Government's brief accordingly.

A. Recent developments in the decisional law demonstrate that the Feres doctrine should bar an FTCA action only when its primary rationale is implicated.

The Government first contends that, "[p]rior to this case, the courts had consistently applied the *Feres* doctrine to bar claims by service members injured incident to service, whether by acts of civilian or military employees of the Federal government" (petitioner's brief, p. 9). This assertion is incorrect. It is true that *some* of the lower courts have consistently applied the *Feres* doctrine in that manner, and the Government has cited a number of those decisions to the Court. However, it is not true that *all* of the lower courts have applied the *Feres* doctrine in that manner. In fact, there are two quite separate approaches to application of the *Feres* doctrine presently in use in the lower courts (one of which the Government has simply ignored here), which is probably why this Court granted certiorari in this case.

As the panel's opinion in this case explains, this Court initially articulated several "rationales" for its creation of the *Feres* doctrine. Because some of those reasons (like the "distinctively federal character of the relationship", and the availability of VA benefits) existed in every suit brought by a serviceman against the Government under the FTCA, lower courts began applying a "bright-line rule"—erecting the *Feres* bar automatically whenever the plaintiff occupied the "status" of "active duty serviceman". *E. g., Carter v. City of Cheyenne*, 649 F.2d 827, 830 (10th Cir. 1981) (". . . the status of the deceased or injured person is that which controls in determining whether the claimant may recover under the Tort Claims Act"); *Uptegrove v. United States*, 600 F.2d 1248, 1249 (9th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980) (". . . only the status of the plaintiff, and not that of the tortfeasor, can be considered in determining the applicability of the *Feres* doctrine"); *United States v. Lee*, 400 F.2d 558, 562 (9th Cir. 1968), *cert. denied*, 393 U.S. 1053 (1969) (". . . the status of the deceased or injured person controls"); *Watkins v. United States*, 462 F. Supp. 980, 985 (S.D. Ga. 1977), *aff'd on opinion below*, 587 F.2d 279 (5th Cir. 1979) (". . . the determinative factor under the *Feres* doctrine is the status of the claimant"). It is these purely "status-related" decisions upon which the Government bottoms its position here.

When applied, of course, the *Feres* doctrine is (in effect) a license for tortious conduct and a mandate of second-class citizenship for servicemen. It therefore did not sit lightly with the lower courts or the commentators. Neither did this Court treat it lightly, and over the course of the years that followed, it refined the foundations of the doctrine, announcing that the doctrine "seems best explained"

by only one of the initially articulated rationales—what has now become known as the "military discipline rationale". *United States v. Brown*, 348 U.S. 110, 112 (1954); *United States v. Muniz*, 374 U.S. 150, 162 (1963); *Chappell v. Wallace*, 462 U.S. 296, 299 (1983); *United States v. Shearer*, 473 U.S. ....., 105 S. Ct. 3039, 87 L. Ed.2d 38, 44 (1985).

With that lead, the lower courts began looking beyond the purely "status-related" test of the earlier decisions to the *reasons* underlying the *Feres* doctrine, and (as the panel's opinion explains in detail) began declining to erect the *Feres* bar when the primary rationale which "serves largely if not exclusively as the predicate for the *Feres* doctrine" was not implicated by the facts of the particular case. *Hunt v. United States*, 636 F.2d 580, 599 (D.C. Cir. 1980). *See Scales v. United States*, 685 F.2d 970, 973 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983) ("*Stencel* and its progeny direct our inquiry to the manner in which the policies underlying *Feres* are affected—specifically the impact on military discipline—rather than to the status of the claimant").

As a result of this shift in methodology, there are numerous recent decisions of the lower courts which decline to erect the *Feres* bar merely because the plaintiff was an active duty serviceman and his injury occurred, in the Government's words, "incident to service".[3] Instead, these decisions hold, in effect, that only one of the rationales initially supporting the *Feres* doctrine has sur-

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3. The term, "incident to service", is clearly no longer a definitive term, if it ever were. It is, or at least has become, a term of art—a mere shorthand method of encapsulating the type of claim which *Feres* bars. It is also entirely too vague to serve as the type of "bright-line rule" which the Government attempts to construct upon it, as the hundreds of decisions which have wrestled with the concept it encapsulates amply illustrate.

vived the scrutiny of time, and that the *Feres* bar should be interposed only when pursuit of the litigation would involve the judiciary in sensitive military affairs at the expense of military discipline. *Johnson v. United States*, 704 F.2d 1431 (9th Cir. 1983), is representative, and we will let its analysis speak for the remaining cases which have reached the same conclusion:

> In defense of its judicially-created "incident to service" exception to the FTCA, the *Feres* Court offered three basic rationales. As the Supreme Court summarized in its most recent discussion of *Feres*, the "incident to service" test is predicated on the "distinctly federal" relationship between the United States and its service personnel, on the presence of an alternative military compensation system, and on the fear of damaging the military disciplinary structure. *See generally Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671-72, 97 S. Ct. 2054, 2057-58, 52 L. Ed.2d 665 (1977). *See also Davis v. United States*, 667 F.2d 822, 825 (9th Cir. 1982); *Lewis v. United States*, 663 F.2d 889, 890 (9th Cir. 1981); *Hunt v. United States*, 636 F.2d 580, 597 (D.C. Cir. 1980).
>
> Decisions subsequent to *Feres* have substantially weakened the persuasive force of the first two rationales. The argument that the military relationship is distinctly federal applies with equal force to other federal agencies that are liable under the FTCA. *See, e. g., Jaffee v. United States*, 663 F.2d 1226, 1233 n. 7 (3d Cir. 1981) (en banc), *cert denied*, 456 U.S. 972, 102 S. Ct. 2234, 72 L. Ed.2d 845 (1982). The second rationale—the existence of an alternative compensation system—has also been applied inconsistently by the Supreme Court. Although the Court mentioned this

argument in *Stencel* and *Feres*, it has rejected it in other equally appropriate cases. *See, e. g., United States v. Brown*, 348 U.S. 110, 113, 75 S. Ct. 141, 143, 99 L. Ed. 139 (1954); *Brooks v. United States*, 337 U.S. at 53, 69 S. Ct. at 920. In short, we agree that "given the Supreme Court's inconsistent treatment of this factor, it cannot be said that the presence of an alternative compensation system either explains or justifies the *Feres* doctrine; it only makes the effect of the doctrine more palatable." *Hunt v. United States*, 636 F.2d at 598. *See also Parker v. United States*, 611 F.2d 1007, 1011 (5th Cir. 1980); *Healy v. United States*, 192 F. Supp. 325, 328 n. 13 (S.D. N.Y.), *aff'd*, 295 F.2d 958 (2d Cir. 1961).

In sum, the most persuasive justification for the *Feres* doctrine is the potential impact of civil suits on military discipline. After reviewing the *Feres* doctrine, the Supreme Court concluded that the incident to service exception is "best explained" by the disciplinary rationale. *United States v. Muniz*, 374 U.S. 150, 159-62, 83 S. Ct. 1850, 1856-57, 10 L. Ed.2d 805 (1958). As the Court has noted,

> the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Torts Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read the act as excluding claims of that character.

United States v. Brown, 348 U.S. at 112, 75 S. Ct. at 145. *See also Hunt v. United States*, 636 F.2d at 599 ("the protection of military discipline . . . serves

> largely if not exclusively as the predicate for the *Feres* doctrine . . . Only this factor can truly explain the *Feres* doctrine and the crucial line it draws . . . ."); *Parker v. United States,* 611 F.2d at 1010; *Viellette v. United States,* 615 F.2d 505, 506 (9th Cir. 1980).
>
> Thus, the necessity of safeguarding military discipline provides the most fundamental rationale for limiting recovery under the FTCA to injuries that are not incident to military service . . . .

704 F.2d at 1435-36.

The court thereafter concluded that, although the facts before it implicated the first two rationales of *Feres*, those rationales were essentially irrelevant—and that its sole task was to determine "whether or not the service member's activities at the time of injury are of the sort that could harm the disciplinary system if litigated in a civil action". *Id.* at 1439. The court then identified the type of activities which could harm military discipline if litigated in a civil action as follows:

> Courts interpreting *Feres* have identified two distinct ways in which military discipline could be impeded by the possibility of civil suits concerning activities bearing a strong relationship to military affairs. First, military decision-makers subject to civil suit "might not be willing to act as quickly and forcefully as is necessary, especially during battlefield conditions," if their actions could be second-guessed in a civilian court. *Jaffee v. United States,* 663 F.2d at 1232. *See also Stencel Aero Engineering Corp. v. United States,* 431 U.S. at 673, 97 S. Ct. at 2059. Second, encouraging military personnel to question decisions by their superiors might have some effect on the willingness of

> such personnel to follow orders. *See, e. g., Jaffee v. United States*, 663 F.2d at 1232; *Hunt v. United States*, 636 F.2d at 599.

704 F.2d at 1439. The court then reviewed the facts before it (active duty serviceman injured by active duty serviceman in automobile accident following after-hours party at NCO club where serviceman had been moonlighting as a bartender); concluded that military discipline could not conceivably be affected by allowing the serviceman's suit against the Government; and held that *Feres* did not bar the suit.

The *Johnson* court summarized its reading of *Feres* as follows: "In sum, where there is no relevant relationship between the service member's behavior and the military interests that might be jeopardized by civil suits, the *Feres* doctrine cannot bar recovery." 704 F.2d at 1440. This conclusion it seems to us, completely undermines the Ninth Circuit's prior "status-related" decisions in *Uptegrove* and *Lee*, both of which involved the negligence of air traffic controllers (and both of which the Government has relied upon here). It undermines them because they are both based exclusively on the first two rationales of *Feres*, and because the necessity of safeguarding "military discipline" is implicated *only* in those cases where a serviceman is suing the Government for the negligence of a fellow serviceman; it is not implicated in a suit by a serviceman against the Government for the negligence of a civilian employee of a civilian agency of the Government.

As we noted, in addition to the lower court's decision in the instant case, there are numerous recent decisions reaching essentially the same conclusion on essentially the same analysis. *E. g., Atkinson v. United States*, 804 F.2d 561 (9th Cir. 1986); *Stanley v. United States*, 786

F.2d 1490 (11th Cir. 1986), *cert. granted* (Dec. 8, 1986; case no. 86-393); *Cole v. United States*, 755 F.2d 873 (11th Cir. 1985); *Roush v. United States*, 752 F.2d 1460 (9th Cir. 1985); *Brown v. United States*, 739 F.2d 362 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 3524, 87 L. Ed.2d 650 (1985); *Brown v. United States*, 715 F.2d 463 (9th Cir. 1983); *Hunt v. United States*, 636 F.2d 580 (D.C. Cir. 1980); *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980); *Cooper v. Perkiomen Airways, Ltd.*, 609 F. Supp. 969 (E.D. Pa. 1985). In our judgment, these cases represent a much more principled resolution of the problem, because a judicially-created exception to a remedial Act of Congress should have a *substantial* reason to support it, and it should only be applied when that substantial reason is implicated.

It is true, as the Government points out, that nearly all of the "serviceman vs. civilian" cases which it has collected here have applied the *Feres* bar, but that is because they relied upon the now-discredited "status-related" test—a test in which the status of the tortfeasor was *a priori* irrelevant, and the effect which the suit might have on military discipline was not considered a particularly relevant consideration. It is also true, as the Government will no doubt point out, that most of the cases which we have collected above are "serviceman vs. serviceman" cases. That should clearly be irrelevant here, however. Certainly, a lower court which would refuse to erect the *Feres* bar in a "serviceman vs. serviceman" case, where military discipline would not be compromised, would not erect it in a "serviceman vs. civilian" case, like this one, for exactly the same reason. Clearly, if application of the *Feres* doctrine depends upon the *reason* for the doctrine, rather than the status of the claimant, then all of the courts whose recent decisions are cited above would have

decided the instant case exactly as the lower court decided it. The Government's assertion to the contrary notwithstanding, there is clearly no consistency at all among the lower courts where application of the *Feres* doctrine is concerned.[4]

It would also appear that this Court's latest foray into the field recognized the ongoing debate among the lower courts concerning the bases for application of the *Feres* doctrine, and at least tentatively resolved that debate—in a manner consistent with the lower court's resolution of the instant case. In *United States v. Shearer*, 473 U.S. ....., 105 S. Ct. 3039, 87 L. Ed.2d 38 (1985), this Court reiterated that "*Feres* seems best explained" by the military discipline rationale, and it observed that the other rationales advanced in the past as support for the *Feres* doctrine were "no longer controlling". *Shearer*, 87 L. Ed.2d at 44, 44 n. 4. The Court also appears to have rejected the position advanced by the Government here—that application of the *Feres* bar depends exclusively upon the active-duty status of the serviceman, rather than the extent to which the facts implicate the only substantial reason for the doctrine —noting that "[t]he *Feres* doctrine cannot be reduced to

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4. That there are presently two conflicting methodologies at work in the lower courts is illustrated by the majority and dissenting opinions of the en banc court in this case, of course. It is also nicely illustrated by *West v. United States*, 729 F.2d 1120 (7th Cir.), *vacated*, 744 F.2d 1317 (7th Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1053 (1985). In that case, the district court initially dismissed an FTCA action brought by a serviceman for injuries suffered by his children as a result of the Government's negligent typing of his blood. Utilizing the analysis which the lower court used in the instant case, the panel which initially decided the appeal unanimously reversed, holding that the action would not impair military discipline and that *Feres* therefore did not bar it. The court granted rehearing en banc. The eight judges who reheard the case were unable to reach a consensus, and the district court's dismissal was thereafter affirmed because of an equally-divided vote of the en banc court.

a few bright-line rules" . . . and that the *Feres* bar should be erected only where "the suit requires the civilian court to second-guess military decisions . . . and . . . the suit might impair essential military discipline."[5] *Id.* This Court also stated that the *Feres* doctrine barred the "*type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness". *Id.* at 45 (emphasis in original). There is not even a hint in the Court's opinion that its application of the *Feres* doctrine turned in any way upon the mere fact that the plaintiff's decedent was a serviceman and the defendant was the Government.

We cannot read this Court's mind, of course, but we think it not improbable that the *Shearer* opinion was drafted with the instant case clearly in mind. At the very least, *Shearer* makes it clear that the purely "status-related" decisions upon which the Government relies involve an oversimplified and now-suspect methodology, and that it is the underlying *reason* for the *Feres* doctrine which must control its application to any given set of facts. We therefore think that *Shearer* implicitly approves the reasoning utilized by the court below—and, if the lower court was correct that maintenance of this action will not "involve the judiciary in sensitive military affairs at the expense of military discipline", the correctness of the result reached upon that reasoning follows in due course.

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5. The Government attempts to finesse this pointed advisory by arguing that the "bright-line rule" rejected in *Shearer* involved the *situs* of the tort. This Court did not merely reject one "bright-line rule", however; it stated that the *Feres* doctrine "cannot be reduced to a few bright-line rules". Surely, the purely "status-related" decisions upon which the Government relies depend upon one of the "bright-line rules" disavowed in *Shearer*.

B. Allowing this action to proceed will not involve the judiciary in sensitive military affairs at the expense of military discipline.

1. Although the Government has only grudgingly conceded the relevance of *Shearer* to this case, it has apparently read the handwriting on the wall—and the bulk of its brief is therefore devoted to an attempt to demonstrate that this action will impair military discipline. The 8-4 majority of the lower court expressly found to the contrary, of course—and not even the dissenting judges (who relied exclusively on the now discredited "status-related" progeny of *Feres*) concluded to the contrary. Although this 12-0 vote against the Government's position on this point should probably be dispositive of its propriety here, we feel constrained to respond to it briefly.

The first thing which we should observe is that all of the so-called "sensitive military matters" which the Government has injected into this case in an effort to implicate the underlying rationale of *Feres* are purely hypothetical. It is also highly unlikely that any of those purely hypothetical issues will ever actually be asserted by the Government in this litigation. As our complaint alleges, the Government has already publicly admitted its negligence in this case. That allegation has yet to be denied in this proceeding in any way, and if the Government acts in good faith toward the plaintiff upon remand, it will admit its liability once again. In short, the only issues which are likely to be tried in this case are the damage issues—and there is nothing in the FTCA (or the *Feres* doctrine) which purports to preclude litigation of those issues. *See Rayonier, Inc. v. United States*, 352 U.S. 315 (1957).

In any event, the very most that the record in this case presently reflects is that LCDR Johnson requested routine air traffic control service, by radio request to a conventional air route traffic control center, when his helicopter encountered instrument flight conditions, as any pilot—civilian, military, foreign, or otherwise—was required to do by federal regulation. No contention has been made that the Coast Guard was negligent in launching the rescue mission at issue in this case, or negligent in any other way. Neither has any contention been made that the weather conditions were so bad that non-military air traffic could not operate in them. Neither has any contention been made that LCDR Johnson's mission was any more dangerous than flight under instrument conditions by a civilian aircraft. Neither has any contention been made that LCDR Johnson was involved in any of the types of "Special Military Operations" described in the Department of Transportation Manual which the Government has added to the record here.

Neither has the Government alleged contributory negligence on the part of LCDR Johnson at this stage of the proceedings. But even assuming that this issue might ultimately surface in the litigation, there will still be only two very narrow factual issues to be decided—whether, after LCDR Johnson submitted his helicopter to the positive control of the Government's air traffic controllers, appropriate directions concerning altitude and heading were given to him, and whether he piloted his helicopter properly in light of those directions. Those questions will not implicate anything even remotely "military" (and especially not anything in the nature of "military discipline")—and their answers will depend solely upon Federal Air Traffic Control Regulations promulgated by the

FAA, which apply equally to civilian and military aircraft alike.[6]

We also think that a claim of contributory negligence would be qualitatively different than the type of claim which this Court has thought necessary to preclude in the past, because it would not involve a claim by one serviceman against another. It would only be a claim by the Government—in its *respondeat superior* status as defendant, because of the acts of one of its civilian employees in another department—that the single serviceman-plaintiff had been negligent. In our judgment, that type of claim does not threaten military discipline in the same way that the typical *Feres* paradigm threatens discipline, if it threatens it at all.

In short, the litigation of this case will be no different in any respect than it would have been if the plaintiff's

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6. 49 U.S.C. §1348(c) directs the Secretary of Transportation "to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft , . . . and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision . . .". 49 U.S.C. §1348(f) makes it perfectly clear that all military aircraft are required to comply with the regulations directed by subsection (c), except in the following narrow circumstances:

> When it is essential to the defense of the United States because of a military emergency or urgent military necessity, and when appropriate military authority so determines, and when prior notice thereof is given to the Secretary of Transportation, such military authority may authorize deviation by military aircraft of the national defense forces of the United States from air traffic rules issued pursuant to this subchapter. Such prior notice shall be given to the Secretary of Transportation at the earliest time practicable and, to the extent time and circumstances permit, every reasonable effort shall be made to consult fully with the Secretary of Transportation and to arrange in advance for the required deviation from the rules on a mutually acceptable basis.

We assure the Court that this exception will never be implicated on the facts in the instant case, and that this is a straightforward case governed by air traffic rules promulgated by the FAA which apply equally to all pilots operating in the national airspace.

decedent had been employed by United Air Lines.[7] Suits by the survivors of commercial airline pilots against the FAA for the negligence of air traffic controllers have never been barred by the *Feres* doctrine, notwithstanding the clearly symbiotic relationship of the FAA and the commercial airline industry, because a suit against the Government for the negligence of the FAA does not charge anyone in the military with misfeasance; it does not bring the actions of military servicemen under judicial scrutiny; and it poses no threat to the military disciplinary structure whatsoever. *See, e. g., Daley v. United States*, 792 F.2d 1081 (11th Cir. 1986); *Foss v. United States*, 623 F.2d 104 (9th Cir. 1980). If an FTCA action is not inappropriate in that circumstance, it is not inappropriate in this case merely because LCDR Johnson happened to be wearing a uniform when he requested routine civilian air traffic control service.[8]

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7. Curiously, the Government asserts that this fact militates in its favor:

> Respondent's claim that this case is "no different * * * than it would have been if [Lieutenant Commander Johnson] had been employed by United Airlines" (Br. in Opp. 9) is particularly telling in this context. If Lieutenant Commander Johnson had been a pilot for United Air Lines, his sole remedy against his employer would have been workmen's compensation, the analogue to veterans' benefits. . . .

(Petitioner's brief, p. 26 n. 14). His sole remedy against his employer (if his employer had been a negligent cause of his death) may well have been worker's compensation, but if his death had been caused by the negligence of an FAA air traffic controller, his sole remedy would be against the Government under the FTCA. And, as we shall demonstrate in the next subsection of this argument, unlike the typical Workers' Compensation Act, the Veterans' Benefits Act does not contain an "exclusive remedy" provision.

8. The Government's concern that the effectiveness of its air traffic controllers will be compromised—because of their "fear [of] being haled into court to have their decisions called into question" and their fear of potential "individual liability"

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The instant case is no different than the case in which a serviceman is struck by an errant bullet negligently fired by an FBI agent into the crowd at an Army-Navy game, or the case in which a serviceman is run over by an automobile operated by a lawyer employed by the Department of Justice. There is also very little difference between this case and *Brooks v. United States*, 337 U.S. 49 (1949), or *United States v. Brown*, 348 U.S. 110 (1954) —at least where compromise of the military disciplinary structure is concerned. The *reason* for the *Feres* doctrine is simply not implicated here, so the *Feres* doctrine is not implicated either. Re-erection of the "bright-line rule" which this Court disavowed in *Shearer* is not necessary here—and the Government's hypothetical cases can clearly be reserved for another day.

2. In any event, if the Court is at all concerned about any of the hypothetical assertions with which the Government has attempted to salvage *Feres* on the straightforward facts in this case, we suggest that the appropriate response would not be dismissal of the plaintiff's congressionally-authorized action at the threshold—on the mere allegations of the complaint, and on the ground of

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Footnote continued—

(petitloner's brief, pp. 16-17)—is no reason to prohibit the plaintiff's action. The Government's air traffic controllers work under the pressure of exercising reasonable care as a function of their job, and they are routinely "haled into court" to account for their negligent actions with respect to civilian pilots and passengers, because Congress has waived the Government's immunity from such suits. Authorizing the instant suit will therefore not impact their effectiveness in any way—although it will certainly give them a reason to exercise the same care with respect to servicemen that they are now motivated to exercise toward civilians. In any event, the individual controller who was responsible for LCDR Johnson's death is not named as a defendant in the plaintiff's action, and it is the rare case in which an air traffic controller is ever named as a defendant in a suit like this one, given the solvency of the Government.

"subject matter jurisdiction". Instead, and because the issue would obviously appear to be "fact sensitive" if the Government were successful in generating such a concern here, the case should be allowed to proceed so that the facts can be sufficiently developed. There will be time enough in the future to dismiss the action if any of the Government's concerns should ever prove to have a foundation—and the provision for summary judgment would appear to be appropriate to that task.

That alternative disposition is important to us, because we know what the facts will be in this case, and we know that they will not implicate any of the Government's hypothetical concerns. The Government also knows that, because the facts of which we are aware are contained in documents which the Government itself prepared during its own internal investigation of the accident in suit.[9] In

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9. Those documents reveal that LCDR Johnson departed the Naval Air Station at Barbers Point on Oahu in good weather under visual flight rules—not under the positive control of the FAA. He proceeded eastbound toward the rescue site (off the island of Maui), where he intended to rendezvous with a Coast Guard C-130 which was orbiting the site in visual meteorological conditions, or land at Maui if weather conditions were unfavorable for a rescue. After more than 20 minutes in visual meteorological conditions, he encountered deteriorating conditions as he was approaching the island of Molokai. At that point, he requested routine IFR (instrument flight rules) handling from the FAA's Air Route Traffic Control Center. The controller on duty cleared him to proceed IFR, and vectored him to a point three miles off the northwest corner of Molokai, stating that he intended to vector him eastbound thereafter along the north shore of the island. An altitude of 2,000 feet was assigned. The controller was also working two civilian air cargo planes on IFR flight plans in the same general area.

Fourteen minutes after LCDR Johnson had requested his IFR clearance, and when his helicopter had cleared the northwest corner of Molokai, the controller assigned him an eastbound heading which was supposed to keep him clear of the north shore of the island. Unfortunately, because of northerly winds in the area, the assigned heading did not produce an eastbound track

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effect, the government has asked this Court to bar this action for reasons it cannot prove, simply because it has never been called upon to prove them—and that is not the way our jurisprudential system is supposed to work. We have been advised by amicus curiae that the legal basis for our suggested alternative disposition will be the primary subject of his brief, so we will not duplicate his efforts here. We will turn instead to the miscellaneous contentions with which the Government has concluded its brief.

C. Neither the Veterans' Benefits Act nor the distinctively federal relationship between a serviceman and the Government, by themselves, provide a reason for barring the plaintiff's action.

1. The Government next asserts that the Veterans' Benefits Act is the plaintiff's "exclusive remedy" and that her FTCA action should be barred as a result. We had thought that this contention was put to rest by this Court long ago when it *squarely* held that the Veterans' Benefits Act did not provide an "exclusive remedy" prevent-

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Footnote continued—

across the ocean. LCDR Johnson flew into a mountain on the northeast corner of the island at 2,000 feet, approximately 11 minutes after turning to the heading assigned by the controller. Although the ground track of his helicopter was displayed on the controller's radar scope throughout those 11 minutes, the controller never corrected the demonstrably erroneous heading which he had initially assigned.

We realize that those facts are not presently in the record, and we would not ordinarily have represented them to the Court. However, the Government's unfounded insistence that this case will compromise sensitive military affairs and that it should be dismissed at the threshold without any opportunity to prove otherwise, has left us little choice. In any event, the documents from which these facts have been derived are the Government's documents, and the Government is free to correct us if we have misread them in any way. The documents are also available to the Court if it should wish to examine them.

ing resort by a serviceman to the FTCA, and that benefits received under the Act were merely to be offset against a recovery in the FTCA action. *Brooks v. United States*, 337 U.S. 49 (1949); *United States v. Brown*, 348 U.S. 110 (1954). Notwithstanding these square holdings, the Government resurrects and advances a dictum (and it is indisputably a dictum) from *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 464 (1980), to the effect that VA benefits are the "exclusive" and "sole remedy" available to servicemen. In our judgment, this dictum provides no basis for reading into the Veterans' Benefits Act an "exclusive remedy" provision which Congress left out. At best, the *Hatzlachh* dictum is ambiguous; at worst, it is inaccurate. The problem is that the *Hatzlachh* dictim attributes a holding to *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), which does not appear there.

In *Stencel*, the Court had noted that "the military compensation scheme provides an upper limit of liability for the Government as to service-connected injuries". 431 U.S. at 673. This offhand statement could not properly be read to mean that the Veterans' Benefits Act provided an "exclusive remedy", unless the Court meant to overrule both *Brooks* and *Brown*. *Stencel* did not purport to overrule either case, however. In fact, *Brown* was cited and quoted with approval in *Stencel*. Our reading of *Stencel* was subsequently vindicated by this Court, *after* it penned the *Hatzlachh* dictum, in *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983). There, the Court stated that *Stencel* relied "primarily on the military nature of the action . . . [and] precluded the substantive claim without regard to any exclusive-liability provision" (460 U.S. at 197 n. 8), and it held that an express exclusive liability provision in the FECA did not bar the type of indemnity

action proscribed by *Feres* and *Stencel*, where the plaintiff in the underlying action against Lockheed was a civilian employee of the Navy. Certainly, the *Hatzlachh* dictum does not survive that later observation.

In any event, most of the lower courts which have confronted the *Hatzlachh* dictum (or the passage from *Stencel* upon which it was based) have read the dictum to mean that receipt of VA benefits becomes a serviceman's "sole remedy" only *because* (and when) the *Feres* doctrine otherwise bars an FTCA action, not that an FTCA action is barred *because* of the receipt of VA benefits. *See, e. g., Cole v. United States*, 755 F.2d 873 (11th Cir. 1985); *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980). That reading of the *Hatzlachh* dictum would appear to have been fully endorsed by this Court's most recent decision on the point, in which it purposefully observed that the VA benefits rationale of *Feres* was "no longer controlling". *Shearer*, 87 L. Ed.2d 44 n. 4. *Brooks* and *Brown* would therefore appear to be still very much alive.

The Government observes that this Court has read "exclusive remedy" provisions into other federal compensation schemes, notwithstanding their omission by Congress. These decisions were bottomed upon this Court's understanding of the "legislative intent" of those schemes, however, and this Court has already determined that the "legislative intent" of Congress in enacting the Veterans' Benefits Act was that it was *not* intended to be a serviceman's "exclusive remedy". *Brooks, supra; Brown, supra.* If the question were open here, we would also observe that 38 U.S.C. §351 expressly recognizes that the FTCA and the Veterans' Benefits Act may provide duplicate recoveries in some circumstances, and that duplication is to

be prevented by appropriate setoffs, as this Court held in *Brooks* and *Brown*.[10] Certainly, if the question of "legislative intent" were still open here, this provision would prove the contrary of the Government's contention here; it would prove that the Veterans' Benefits Act was *not* intended to be an "exclusive remedy", precluding resort to the FTCA. It is also worth noting that reading an "exclusive remedy" provision into the Veterans' Benefits Act would deprive *all* veterans, not merely active-duty servicemen, of their remedies under the FTCA. Unless this Court is anxious to recede from its "no longer controlling" announcement in *Shearer* before its ink has scarcely dried, the plaintiff's entitlement to Veterans' Benefits, by itself, provides no reason for barring her FTCA action.

2. The Government next contends, borrowing from another of *Feres*' now-discredited rationales, that it would be anomalous for the Government's liability in cases like this one to depend upon the different laws of 50 states. This contention, like the preceding one, is also made in the face of this Court's observation in *Shearer* that this rationale of *Feres* is now "no longer controlling". That rationale has not been a viable rationale for *Feres* since this Court discarded it in *United States v. Muniz*, 374 U.S. 150 (1963).

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10. . . . Where an individual is, on or after December 1, 1962, awarded a judgment against the United States in a civil action brought pursuant to section 1346(b) of title 28 or, on or after December 1, 1962, enters into a settlement or compromise under section 2672 or 2677 of title 28 by reason of a disability, aggravation, or death treated pursuant to this section as if it were service-connected, then no benefits shall be paid to such individual for any month beginning after the date such judgment, settlement, or compromise on account of such disability, aggravation, or death becomes final until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise.

There is a more important point to be made here, however. This Court's announcement in *Feres* that it would be anomalous to have the "distinctively federal relationship" of the Government and its servicemen governed by the different laws of the several states was made in the context of an *intramilitary* dispute. It *is* arguably anomalous to have sensitive military affairs impacting upon military discipline governed by separate state laws. However, it is clearly the unique relationship between servicemen and their superiors in the chain of command which implicates this concern, not the mere fact that servicemen are federal employees—which is probably why this Court carefully phrased its observation in *Shearer* that, "[a]lthough no longer controlling, . . . [i]t would be anomalous for the Government's *duty to supervise servicemen* to depend on the local law of the various states". *Shearer*, 87 L. Ed.2d at 44 n. 4 (emphasis supplied). We need not quarrel with that observation here.

We need not quarrel with the observation because the "duty to supervise servicemen" is simply not in issue here. What is at issue here is the negligence of a civilian air traffic controller employed by the FAA. The FTCA provides that the propriety of the conduct of FAA controllers is to be governed by the various laws of the several states, and if LCDR Johnson had been a civilian, the propriety of the heading and altitude assigned to him by the negligent controller who precipitated this case would clearly be determined by the law of Hawaii. If that is anomalous, the anomaly was purposefully created by Congress, and the anomaly itself can therefore provide no reason for barring the plaintiff's resort to the very Act which purposefully created it. In short, whatever viability the "distinctively federal relationship" rationale may

still retain, it can only be a reason for prohibiting FTCA actions which involve the judiciary in sensitive military affairs at the expense of military discipline. It cannot be a valid reason for prohibiting a suit against the Government for the negligence of an air traffic controller, because the judiciary routinely involves itself in those kinds of suits every day. *See Cooper v. Perkiomen Airways, Ltd.*, 609 F. Supp. 969 (E.D. Pa. 1985) (*Feres* does not bar suit against FAA by serviceman, as passenger in commercial airplane; not anomalous to apply law of place of accident).

3. Finally, the Government contends that an affirmance of the lower court's decision will allow plaintiffs to "evade" the *Feres* doctrine by "artful pleading", "simply by alleging only civilian negligence" (petitioner's brief, pp. 26-27). Frankly, we are puzzled by this contention. The issue presented here is not how to plead a case against the Government; the issue is whether the Government can be held *liable* for the negligence of a civilian employee who has wrongfully killed a serviceman. "Civilian negligence" was alleged in this case, not to "evade" the *Feres* doctrine, but because the tortfeasor was a civilian. If the tortfeasor had been a superior officer of LCDR Johnson, no amount of "artful pleading" in the world could have allowed us to "evade" the *Feres* doctrine merely by alleging that he was a civilian—because we could never have proven it, and the *Feres* doctrine would ultimately have barred our action on the facts. It is clearly the facts which control this issue; the pleadings will take care of themselves.

D. A concluding observation.

We recognize that there is tension in the decisional law on the point at issue here—tension which requires resolution of conflicting views. Resolution of the tension

requires reasoned analysis, however—and if there is to be a reasoned analysis of the tension, it must begin with the reasons that the *Feres* doctrine was adopted in the first place. The *Feres* doctrine does have a legitimate purpose and a primary reason—the preservation of military discipline. It is neither a license for tortious conduct nor a mandate of second-class citizenship for servicemen. When applied, however, it undeniably has both effects.

The *Feres* doctrine should therefore be applied sparingly, only when necessary—only when its legitimate purpose and primary reason are served:

> Chief Justice Warren had occasion to note that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes:" Warren, The Bill of Rights and the Military, 37 NYUL Rev. 181, 188 (1962). This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service. [Citations omitted]. But the special relationships that define military life have "supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that the courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." Warren, supra, at 187.

Chappell v. Wallace, 462 U.S. 296, 304-05 (1983).

The instant case does not intrude upon military affairs, nor will it have any impact upon the military disciplinary structure. *Feres* is, in short, a rule without a reason on the facts in this case—and to apply it in this case, merely because LCDR Johnson had doffed his civilian clothes,

would do no more than license tortious conduct and mandate second-class citizenship for no legitimate reason. We therefore urge the Court to decline the Government's request that the limited exception to the FTCA created by *Feres* be expanded to embrace the quite different circumstances presented in this case.

CONCLUSION

It is respectfully submitted that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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